In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THOMAS L. HARTIGAN
v.
THE UNITED STATES. } No. 72.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a claim involving the right of a former cadet of the United States Military Academy at West Point, who was summarily dismissed by order of the President, to recover the pay of a cadet from the date of his dismissal, July 27, 1883, to July 1, 1889, amounting to over $3,000, upon the ground that the President had no authority to order his dismissal and, therefore, his dismissal was a nullity.

Thomas L. Hartigan, the claimant, entered the United States Military Academy on July 1, 1880, as a conditional cadet. On the day preceding his entrance, June 30, 1880, he took the required oath of office, set forth in full in the findings of fact of the Court of

Claims. (Rec., p. 7.) After he had successfully passed his semiannual examination he was given a certificate of appointment, dated February 10, 1881, also set forth in the findings of fact. (Rec., pp. 7 and 8.) On February 12, 1881, he entered into articles of agreement with the United States to serve for a period of eight years unless sooner discharged by competent authority, and to obey the legal orders of his superior officers and the rules and articles governing the Army of the United States. The contract is fully set forth in the findings of fact. (Rec., p. 8.) The twenty-first regulation of the Military Academy, 1883, required this contract to be signed by the cadet before receiving his certificate of appointment, and sections 1320 and 1321, Revised Statutes, require it before his admission to the Academy.

The claimant served in the Military Academy until July 27, 1883. After the annual examinations had been passed and while the corps of cadets was encamped at West Point, the claimant was, on July 27, 1883, summarily dismissed from the service of the United States by order of the President upon the charges of hazing a new cadet on guard duty, personating the officer of the guard, making use of the countersign, and disobedience of orders. (Rec., p. 8.)

After the dismissal, on July 27, 1883, of the claimant, George William Kirkman was appointed a cadet at the United States Military Academy from the Third Congressional district of Illinois on June 15, 1884, to succeed the claimant, and the said George William Kirkman was graduated from the Academy and appointed during a recess of the Senate to be second

lieutenant in the First Regiment of Infantry, United States Army, June 12, 1889. He was nominated to the Senate December 16, 1889, for the appointment of second lieutenant, dating from June 12, 1889. The nomination was confirmed by the Senate December 20, 1889, and he was commissioned by the President accordingly January 7, 1890, to rank from June 12, 1889. The said George William Kirkman is now a captain in the Twenty-fifth Regiment of Infantry, United States Army (Rec., pp. 8 and 9).

Some time between June 27, 1883, the date of claimant's dismissal from the United States Military Academy, and March 5, 1888, the date of claimant's first petition to the President, the claimant intermarried with some person whose name is not shown by the record (Rec., p. 9).

On July 30, 1883, the claimant addressed a statement and petition to the Adjutant-General of the United States Army requesting reinstatement in the cadet corps and a court-martial. On August 3, 1883, the claimant addressed another petition to the Secretary of War requesting reinstatement. The facts contained in neither of these two petitions were verified by affidavit, as required by section 1230 of the Revised Statutes. On April 21, 1888, the claimant, through the Secretary of War, and by the hand of Senator Cullom, presented a petition to the President requesting the revocation of the order of dismissal, an order for his trial by court-martial, and an order assigning and appointing him in the Army as of the

date of the assignment of the lowest grade of his class. None of these petitions were granted. (Rec., p. 9.)

The court gave judgment against the claimant, dismissing the petition, and this appeal is from such judgment.

ARGUMENT.

CLAIMANT NOT AN OFFICER WITHIN INTENT OF SECTION 1229, REVISED STATUTES.

The Court of Claims, speaking through Mr. Justice Weldon, in the opinion of the court in this case, held that a cadet in the Military Academy of the United States is not such an officer as is contemplated by section 1229, Revised Statutes, and therefore does not fall within the prohibition of the statute forbidding dismissal of an officer in the military or naval service in time of peace unless in conformity with the sentence of a court-martial. This opinion is abundantly supported, not only by the reasoning of the opinion, but also by the authorities cited, and hence the argument here presented upon that point will, of necessity, be in amplification.

HISTORY OF LEGISLATION RELATIVE TO MILITARY CADETS.

Cadets do not appear to have formed any part of the military establishment of the United States Army prior to the act of May 9, 1794, entitled "An act providing for raising and organizing a corps of artillerists and engineers," the third section of which provides:

> The organization of the said corps be as herein mentioned, to wit: One lieutenant-colonel commandant, one adjutant, one surgeon; four battalions, each to consist of one

> major, one adjutant and paymaster, and one surgeon's mate; and four companies, each to consist of one captain, two lieutenants, *two cadets with the pay, clothing, and rations of a sergeant*, etc. (1 U. S. Stat. L., 366.)

The only difference that this statute made between sergeants and cadets was one of title. Their pay was the same, their clothing was the same, and their rations were the same, and the sixth section of the act of July 16, 1798, entitled "An act to increase the Army, and regulating the pay thereof," provided—

> That the monthly pay of the noncommissioned officers, musicians, and privates, * * * shall be as follows: *Cadets, $10 per month and two rations per day*, etc.

Section 2 of the act of March 16, 1802, entitled "An act fixing the military peace establishment of the United States," provided—

> That each company (of artillery) to consist of one captain, one first lieutenant, one second lieutenant, *two cadets*, four sergeants, four corporals, four musicians, eight artificers, and fifty-six privates.

Section 4 provides for monthly pay as follows:

> * * * To each second lieutenant, twenty-five dollars; to each ensign, twenty dollars; *to each cadet, ten dollars;* to each sergeant-major, nine dollars; to each sergeant, eight dollars; to each corporal, seven dollars; to each teacher of music, eight dollars; to each musician, six dollars; to each artificer, ten dollars; and to each private, five dollars.

Section 11 provides:

> That the commissioned officers who shall be employed in the recruiting service, to keep up by voluntary enlistment, the corps as aforesaid, shall be entitled to receive for every effective able-bodied citizen of the United States, who shall be duly enlisted by him for the term of five years (giving qualifications): *And provided also,* That no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent, guardian, or master first had and obtained, if any he have. * * *

The section above quoted is significant in that it provides that only commissioned officers were to be employed in the duty of enlisting recruits, and that their duty was *to enlist all other members of the corps lower than the rank of a commissioned officer.*

Section 26 provides:

> That the President of the United States is hereby authorized and empowered, when he shall deem it expedient, to organize and establish a corps of engineers, to consist of one engineer with the pay, rank, and emoluments of a major; two assistant engineers with the pay, rank, and emoluments of captains; two other assistant engineers with the pay, rank, and emoluments of first lieutenants; two other assistant engineers with the pay, rank, and emoluments of second lieutenants, *and ten cadets with the pay of sixteen dollars per month and two rations per day;* and the President of the United

> States is in like manner authorized, when he shall deem it proper, to make such promotions in the said corps, with a view to particular merit and without regard to rank, so as not to exceed one colonel, one lieutenant-colonel, two majors, four captains, four first lieutenants, four second lieutenants, and so as that the number of the whole corps shall at no time exceed *twenty officers and cadets.*

Section 27 provides:

> That the said corps, when so organized, shall be stationed at West Point in the State of New York, and shall constitute a military academy; and the engineers, assistant engineers, *and cadets* of the said corps, shall be subject, at all times, to do duty in such places, and on such service, as the President of the United States shall direct. (2 Stat. L., pp. 132–137.)

It was not until the United States had again become involved in hostilities with Great Britain that any additional legislation was passed in regard to perfecting the establishment of the Military Academy at West Point. Accordingly, on April 29, 1812, an act of Congress was approved which established the Military Academy at West Point upon the lines which it has followed ever since.

Section 1 of the act of April 29, 1812, provides for the increase and reorganization of the Engineer Corps proper.

Section 2 provides for the corps of instructors at the Military Academy.

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Section 3 provides:

> That the cadets heretofore appointed in the service of the United States, whether of artillery, cavalry, riflemen, or infantry, or that may in future be appointed as hereinafter provided, shall at no time exceed two hundred and fifty; that they may be attached, at the discretion of the President of the United States, as students to the Military Academy, and be subject to the established regulations thereof; that they shall be arranged into companies of noncommissioned officers and privates, according to the directions of the commandant of engineers, and be officered from the said corps, for the purposes of military instruction; that there shall be added to each company of cadets four musicians; and the said corps shall be trained and taught all the duties of a private, noncommissioned officer, and officer, be encamped at least three months of each year, and taught all the duties incident to a regular camp; that the candidates for cadets be not under the age of fourteen nor above the age of twenty-one years; that each cadet, previously to his appointment by the President of the United States, shall be well versed in reading, writing, and arithmetic, and that he shall sign articles, with the consent of his parent or guardian, by which he shall engage to serve five years, unless sooner discharged; and all such cadets shall be entitled to and receive the pay and emoluments now allowed by law to cadets in the Corps of Engineers.

Section 4 provides—

> That when any cadet shall receive a regular degree from the academical staff, after going through all the classes, *he shall be considered as among the candidates for a commission* in any corps, according to the duties he may be judged competent to perform; and in case there shall not at the time be a vacancy in such corps, he may be attached to it, at the discretion of the President of the United States, by brevet of the lowest grade, as a supernumerary officer, with the usual pay and emoluments of such grade, until a vacancy shall happen: *Provided*, That there shall not be more than one supernumerary officer to any one company at the same time. (2 Stat. L., pp. 720–721.)

Section 3 of the act of June 18, 1878, provides—

> That hereafter all vacancies in the grade of second lieutenant shall be filled by appointment from the graduates of the Military Academy so long as any such remain in service unassigned; and any vacancies thereafter remaining shall be filled by promotion of meritorious noncommissioned officers of the Army, recommended under the provisions of the next section of this act: *Provided*, That all vacancies remaining, after exhausting the two classes named, may be filled by appointment of persons in civil life.

Previous to the establishment of military schools in the different countries where he served, the status of the cadet was well recognized and fixed. He was a young scion of nobility who served as a private in the

ranks in order to acquire a military education and experience in the practice of warfare, with the avowed purpose of obtaining a commission as an officer. He was actively engaged in the field against the enemies of his country, and endured the dangers and privations of a common soldier, from whom, indeed, he differed only in social rank and superior education. After the establishment of military schools the status of the cadet appears to have undergone a decided change, for while still a volunteer, with the sole purpose of acquiring a complete military education in order to secure a commission in the Army, his duties no longer compelled him to serve in an active campaign against the enemies of his country, but they now partook of the duties characteristic of the student, and even his military instruction was in the "arena of mimic warfare." A careful study of the evolution of the cadet would seem to establish the fact that he is a distinct species and a law unto himself. Nevertheless, in all the various changes through which he has passed he has preserved the distinctive character of "the younger brother" of the commissioned officer.

In the United States cadets appear to have come into existence as the connecting link between commissioned and noncommissioned officers—"candidates merely for commissioned officers"—in the language of the Court of Claims.

THE WEST POINT CADET AN ENLISTED MAN.

Considering the ultimate purposes for which cadets were educated and trained at the United States Mili-

tary Academy, it became of the highest importance that they should be placed under complete control of their instructors. This is of even more importance when the great cost to the Government of their education is taken into consideration. Complete obedience and subjection to control can in no other way be so effectually attained as by compelling cadets to enlist in the service of the United States, and thereby become subject to the Rules and Articles of War.

An enlistment is the act of making a contract to serve the Government in a subordinate capacity, either in the Army or the Navy. (*Erichson* v. *Beach*, 40 Conn., 283.)

An enlistment is a contract between the soldier and the Government, which involves, like marriage, a change in his status which can not be thrown off by him at his will, although he may violate his contract. By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties, and although he may violate his contract obligations, his status as a soldier is unchanged. (*In re Grimley*, 137 U. S., 147.)

The following sections of the Revised Statutes, regulating the admission of cadets to the United States Military Academy, are particularly pertinent here:

Section 1315 provides:

> The corps of cadets shall consist of one from each Congressional district, one from each Territory, one from the District of Columbia, and

ten from the United States at large. They shall be appointed by the President, and shall, with the exception of the ten cadets appointed at large, be actual residents of the Congressional or Territorial districts, or of the District of Columbia, respectively, from which they purport to be appointed.

Section 1317 provides:

Cadets shall be appointed one year in advance of the time of their admission to the Academy, except in cases where by reason of death or other cause a vacancy occurs which can not be provided for by such appointment in advance; but no pay or other allowance shall be given to any appointee until he shall have been regularly admitted, as herein provided; and all appointments shall be conditional until such provisions shall have been complied with.

SEC. 1320. Each cadet shall, previous to his admission to the Academy, take and subscribe an oath or affirmation in the following form:

"I, A B, do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty, or fealty I may owe to any State, county, or country whatsoever; and that I will at all times obey the legal orders of my superior officers, *and the rules and articles governing the armies of the United States.*"

And any cadet or candidate for admission who shall refuse to take this oath shall be dismissed from the service.

SEC. 1321. Each cadet shall sign articles, with the consent of his parents or guardian if he be a minor, and if any he have, by which he shall engage to *serve eight years unless sooner discharged.*

SEC. 1322. The Corps of Cadets shall be arranged into companies, according to the directions of the Superintendent, each of which shall be commanded by an officer of the Army, for the purpose of military instruction. To each company shall be added four musicians. The corps shall be taught and trained in all the duties of a private soldier, noncommissioned officer, and officer; shall be encamped at least three months in each year, and shall be taught and trained in all the duties incident to a regular camp.

SEC. 1323. Cadets shall be subject at all times to do duty in such places and on such service as the President may direct.

The articles which cadets were formerly compelled to sign are in the following form:

I, ———, aged ——, having been selected for an appointment as cadet in the Military Academy of the United States, do hereby engage, with the consent of my father, in the event of my receiving such appointment, that I will serve in the Army of the United States for eight years, unless sooner discharged by competent authority; and I, ———, do solemnly swear that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever,

and that I will observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

———— ————.

Sworn and subscribed to at ————, this —— day of ————, ——, before me.

The above contract is taken from the findings of fact of the court in the case of *Babbitt* v. *United States* (16 C. Cls. R., 204) affirmed by the Supreme Court (104 U. S., 767), and differs only slightly from the contract of the claimant.

A comparison between the foregoing and the sections of the Revised Statutes providing for the enlistment of private soldiers and prescribing the form of the articles of agreement to be signed by them seems instructive:

SEC. 1116. Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years at the time of their enlistment. This limitation as to age shall not apply to soldiers reenlisting.

SEC. 1117. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control.

SEC. 1118. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of

(*any criminal offense*) (a felony) shall be enlisted or mustered into the military service.

SEC. 1119. All enlistments in the Army shall be for the term of five years.

Regulation 767 of the Army, 1881, provides that, "As soon as practicable, and at least within six days *after his enlistment, the* following oath will be administered to the recruit:"

> I, ———, born in ———, in the State of ———, aged —— years and —— months, and by occupation a ———, do hereby acknowledge to have voluntarily enlisted this —— day of ———, 190—, as a soldier in the Army of the United States of America, for the period of three years, unless sooner discharged by proper authority. And do also agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.
>
> ——— ——— [SEAL.]
>
> Subscribed and duly sworn to before me this —— day of ———, A. D. 190—.
>
> ——— ———.

It will be seen on comparison that the contract entered into by a cadet is almost identical with the

contract entered into by a private soldier. The Court of Claims in the *Harmon case* (23 C. Cls. R., 132), in considering the contract of a cadet midshipman, uses this language:

> It will be seen by reference to the twelfth finding that the obligation assumed by the cadet on his admission to the Academy is in consonance with the view of the law herein stated. The obligation on his part was to serve eight years, "unless sooner discharged by competent authority." * * * Obligations are not always mutual in the liability of the parties to perform. They are often unilateral, giving a right to one to declare the obligation at an end, while the other party is bound to a full performance.

The finding referred to by the Court of Claims is the contract which a cadet-midshipman executes upon entering the Naval Academy, and is almost identical with the contract which a cadet at West Point signs, although it does not appear that the statutes provide for such an obligation on the part of the cadet-midshipman.

The West Point cadet, after his enlistment, receives something that the private soldier does not receive, and which it has for years been the custom to give, though not authorized by law—a certificate of appointment—which reads as follows:

> *To all whom it may concern:*
>
> Know ye that the President has been pleased to appoint ——— a cadet of the United States Military Academy, to rank as such from the —— day of ———, 18—.

Given under my hand and seal, at the War Department, this —— day of ———, in the year of our Lord 18—, and of the Independence of the United States the ———.

———— ————,

Secretary of War.

The certificate given to a cadet by the Secretary of War, after his engagement, adds nothing to the material rights or standing of the cadet, and appears to have been given merely as evidence to establish his membership in the corps of cadets, and not as conferring any additional rights upon him.

The cadet enters into a contract with the Government to serve for eight years, *unless sooner discharged by competent authority, and to obey the orders of his superior officers according to the Rules and Articles of War.* In return he receives a salary of $500 per year and one ration a day, as provided for by section 1339 of the Revised Statutes. He also receives a thorough and complete education and military training. In this contract the appointing power reserves the right to discharge him at any time and for any reason that may seem proper, and the cadet is bound by his contract to acquiesce in that determination. On the contrary, if the appointing power should determine that the good of the service requires the cadet to serve the full time of his enlistment, he is compelled by the terms of the contract to submit also to that determination. In other words, *the contract is unilateral*, but is none the less binding on that account.

The first Attorney-General to give an opinion as to the status of cadets at West Point was Attorney-General Wirt. Reviewing the decision of a court-martial, he said:

> It is suggested by Colonel Hindman, on behalf of the court-martial, that these cadets are merely students. In one sense they are so; and so was the corps known under the name of artillerists and engineers; so was the original corps of engineers who constituted the Military Academy. For both, books, instruments, and apparatus for study were expressly provided by law; yet this character of students did not exempt them from a liability to martial law. But if the suggestion is intended to place these cadets on the footing of civil students, clothed with all their civil privileges and immunities, it is proper to remark that these cadets occupy a very different ground. *They are enlisted soldiers; they engage, like soldiers, to serve for five years, unless sooner discharged; they receive the pay, rations, and emoluments of sergeants;* they are bound to perform military duty in such places and on such service as the Commander in Chief of the Army of the United States shall order, and finally, by the act of the 3d of March, 1815, fixing "the military peace establishment of the United States," the corps to which they are attached, and of which they form a part, is expressly recognized as a part of the military establishment. (1 Opp. of Atty. Gen., 276, 290.)

Long after the above opinion was rendered, this court decided that service at West Point should be

taken into consideration in calculating the longevity pay of army officers, and used the following language in the case of *The United States* v. *Watson* (an appeal case from the Court of Claims), 130 U. S., pages 82–83:

> From this review of the statutes it can not be doubted that before the passage of the act of July 28, 1866 (now paragraph 1094, Revised Statutes, which in so many words classes the cadets at West Point as a part of the Army of the United States), as well as afterwards, the corps of cadets of the Military Academy was a part of the Army of the United States, and a person serving as a cadet was serving in the Army. * * * The practical construction of the requirement of the act of 1838, that the cadet should engage to serve for eight years, shown by the fact that the form of the engagement in this case was to "serve in the Army of the United States for eight years," is a circumstance of weight to show that the Government, from the beginning, treated the plaintiff as serving in the Army. The service for which he engaged began on the 1st of July, 1865, and the eight years ran from that time. That being his status, the acts of 1881 and 1882, in speaking of "actual time of service in the Army," cover the time of his service as a cadet. * * * Under the statutes involved in the present case, a cadet at West Point is serving in the Army as fully as an officer retired from active service is serving in the Army, under the statutes which apply to him, so far as the question of longevity pay is concerned.

During the war of the rebellion a corps of medical cadets was provided for by the act entitled "An act providing for the better organization of the military establishment," approved August 3, 1861.

The fifth section of said act provides—

> That there be added to the medical staff of the Army a corps of medical cadets, whose duty it shall be to act as dressers in the general hospitals, and as ambulance attendants in the field, under the direction and control of the medical officers alone. *They shall have the same rank and pay as the military cadets at West Point.* Their number shall be regulated by the exigencies of the service, at no time to exceed fifty. It shall be composed of young men of liberal education, students of medicine, between the ages of eighteen and twenty-three, who have been reading medicine for two years and have attended at least one course of lectures in a medical college. *They shall enlist for one year, and be subject to the Rules and Articles of War.*

Under this section the Judge-Advocate-General decided that the medical cadets, though not private soldiers nor noncommissioned officers, were clearly enlisted men. It is evident that this corps was added to the medical staff of the Army to meet the exigencies of the civil war, and their position in the Army was analogous to that of the cadets at the United States Military Academy.

The difficulty in fixing the status of a cadet at the United States Military Academy appears to have arisen from an effort to divide, by an ironclad rule, the

Army of the United States into three classes of men—private soldiers, commissioned and noncommissioned officers, whereas a careful examination of the statutes, by which the Army has been built up, would appear to indicate that there are at least four classes of men composing the Army—commissioned and noncommissioned officers, privates, and cadets.

THE CLAIMANT WAS NOT AN OFFICER WITHIN THE MEANING OF SECTION 1229, REVISED STATUTES.

The whole case of the claimant hinges upon one point, which put in the form of a question would read as follows: "Is a cadet at the United States Military Academy an officer within the meaning of section 1229 of the Revised Statutes?" which reads:

> SEC. 1229. The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.

That part of section 1229 under which the claimant contends that his dismissal from West Point by the President was illegal has been reenacted in article 99 of the Articles of War. The Articles of War is the code established for the government of the United States Army and Navy. The code for the Army was enacted under section 1342 of the Revised Statutes and

the code for the Navy was enacted under section 1624 of the Revised Statutes.

The claimant in his contract with the Government bound himself to obey the Articles of War, and thereby became amenable to the articles composing that code.

The Articles of War were enacted by section 1342, which provides:

> SEC. 1342. The armies of the United States shall be governed by the following rules and articles: The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include noncommissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial.

So far as the case at bar is concerned, it is only necessary to consider the above section and articles 4 and 99, enacted by it.

Article 4 provides:

> No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

And article 99 provides:

> No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof.

Section 1342 provides that the word officer, as used in the Articles of War, shall be understood *to designate a commissioned officer*, and that "the word soldier shall be understood to include noncommissioned officers, musicians, artificers, and privates, *and other enlisted men.*"

The Army, for the purposes of the Articles of War, is divided into two general classes—commissioned officers and soldiers; and in the enumeration of men included in the term soldier there is but one place where cadets can possibly enter and be governed by the Articles of War. They have bound themselves by contract to obey the Articles of War; therefore, in order to carry out the expressed will of Congress, they must come in under the term used in section 1342, "*and other enlisted men.*"

Cadets, being bound by the Articles of War, are bound by article 4, which authorizes the President, the Secretary of War, and the commanding officer of a department to discharge an enlisted man before his term of service has expired. A cadet at the United States Military Academy can not possibly be protected from discharge, by order of the President, by article

99, because the meaning of officer, as therein used, has been qualified by section 1342 of the Revised Statutes to mean *a commissioned officer*.

The Court of Claims has said, in the case of *Babbitt* v. *The United States* (16 C. Cls. R., 202), affirmed by this court (104 U. S., 767), that "cadets are not commissioned officers," and it is therefore impossible that cadets can be protected by section 1229 of the Revised Statutes, taken independently of article 99 of the Articles of War, because section 1342, by reenacting the provision that "officers, in time of peace, shall not be dismissed without a court-martial," and by defining what the word officer shall mean, has interpreted section 1229, and clearly indicates that Congress intended that only commissioned officers should be excepted from dismissal by the President alone.

The court also said in the case of Babbitt (*supra*), on pages 221 and 222:

> Prior to the Revised Statutes they were, like any other soldier, justiceable by a court-martial for any violation of the Articles of War. But the section introductory of the Articles of War in the Revised Statutes, section 1342, contains these words: "The armies of the United States shall be governed by the following rules and articles: The word 'officer,' as used therein, shall be understood to designate commissioned officers; the word 'soldier,' shall be understood to include noncommissioned officers, musicians, artificers, and privates, and other enlisted men;" and it is argued that as a cadet is not a commissioned or a noncommissioned officer, or a

> musician, artificer, or private, he is not subject to the Articles of War unless he is an enlisted man.
>
> This presents no real difficulty. No one supposes for an instant that Congress did not intend to subject the cadets to the Articles of War. If it were necessary, in order to carry into effect the undoubted legislative will, it might be held that *a cadet is an enlisted man for the purposes of section 1342 of the Revised Statutes*, but that he is not one in any other relation to statute law.

It has become necessary in this case that a cadet should be brought within the provisions of section 1342, and it is very evident that there is but one class under which he could possibly come in—that of *an enlisted man;* and the court has said that if that should ever be necessary, then *he is an enlisted man within the meaning of section 1342 of the Revised Statutes.*

STATUS OF CADETS AT THE NAVAL ACADEMY DIFFERENT FROM THE STATUS OF THOSE AT THE MILITARY ACADEMY.

There are a number of decisions fixing the status of cadets and noncommissioned officers in the Navy; but the conditions prevailing in the Navy have no analogy to those in the Army, for the reason that section 1624 enacting the Articles of War for the Navy simply provides that:

> The Navy of the United States shall be governed by the following articles: (Then follow the Articles of War.)

The provision of section 1229 of the Revised Statutes, reenacted in article 99 for the Army, has been reenacted in article 36 for the Navy.

Now, it will readily be seen that any kind of an officer might come within the protection of article 36 of the Articles of War for the Navy, because no attempt whatever has been made to qualify the word officer, and this court has held, in *Perkins* v. *The United States* (116 U. S., 483), that a cadet-engineer was one of those inferior officers whose appointment by the President alone was authorized by article 2, section 2, of the Constitution, and that he came within the protection of the provision of section 1229, which says that no officer shall be discharged in time of peace except by court-martial. The Perkins case is not applicable to the case at bar for the reason above stated, and also because cadet-engineers, when that class of cadets existed, were governed by rules, both upon their entrance and afterwards, very different from the rules governing cadets at West Point. For instance, there was no statute requiring them to enter into a contract to serve for eight years, *unless sooner discharged*, and sections 1394, 1403, and 1525 provide for the continuance of cadet-engineers in the Navy, unless discharged for inefficiency or dismissed for misconduct, but there are no such provisions protecting cadets at the United States Military Academy, or, for that matter, protecting cadet-midshipmen either.

THE CLAIMANT, WHATEVER HIS MILITARY STATUS, WAS NOT PROTECTED BY SECTION 1229, REVISED STATUTES.

Whether the military status of the claimant was that of an enlisted man or officer, in either event he was removed by the President in the exercise of ample authority, unrestricted by section 1229. Such power of removal from office is incident to the power of appointment. (*Ex parte Hennen*, 13 Pet., 259.) It is possessed by the President as a correlative of the power of appointment vested in him by the Constitution. Whether or not it is subject to statutory restriction by Congress remains as yet undecided by this court, but in every instance where such restriction has been attempted this court has construed such legislation with great strictness.

> *Blake* v. *United States*, 103 U. S, 227, 236, affirmed and followed in *Mullan* v. *United States*, 140 U. S., 240;
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> *Parsons* v. *United States*, 167 U. S., 334, 335, 339, 341;
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> *Shurtleff* v. *United States*, 189 U. S., 314.

In *Blake* v. *United States*, section 1229 received explicit construction by this court, the claimant, as in this case, having invoked its protection, and the court was of the opinion that the section should—

> be held to mean that whereas, under the act of July 17, 1862, as well as before its passage, the President alone was authorized to dismiss an army or naval officer from the service for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote, the public service, he alone

> shall not, thereafter, in time of peace, exercise such power of dismissal, except in pursuance of a court-martial sentence to that effect, or in commutation thereof (opinion by Mr. Justice Harlan, p. 235).

and thereupon reached the conclusion that there was no purpose by this section "to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of some one in his place" (p. 236).

It follows from this decision that the President has general power to summarily remove an officer of the Army; but that section 1229 is an attempt, the validity of which is not determined, to restrict the exercise of that power in time of peace to the execution of the sentence of a court-martial, *unless* the Senate of the United States cooperate in such removal. It seems clear from this interpretation that section 1229 was intended to apply only to commissioned officers, whose appointment by the President must receive confirmation by the Senate, since it is only in the case of a commissioned officer that the Senate could directly cooperate in his removal by the President through confirmation of the appointment of his successor. In this view of the statute, it leaves untouched the power of the President to remove such inferior officers of the Army as are appointed by the President alone. Accordingly, granting for the sake of argument that the claimant was some sort of an officer in the military service, yet since according to his own contention he was not

a commissioned officer, he can not invoke the protection of section 1229.

It should be observed in passing that, as is shown by the record, the removal of the claimant was ratified and confirmed by the Senate, so far as that body was able to cooperate in the same, by the confirmation of his successor after graduation from the Military Academy when nominated for the appointment of second lieutenant. (Finding IV, Rec., p. 8.)

THE REMOVAL OF THE CLAIMANT WAS NOT ONLY VALID BUT REASONABLE, AND AN EXERCISE OF SALUTARY AND NECESSARY DISCIPLINE.

In all private and State educational institutions throughout the United States the right of summary dismissal is vested in the academic boards, and no doubt this power has been conferred for good and sufficient reasons resulting from long experience in the work of education. It would seem that summary dismissals are of even more importance in the military and naval academies of the United States, taking into consideration the important and responsible positions which the students from those institutions are destined to eventually fill.

The real charge upon which the claimant in this case was dismissed was that of hazing a new cadet who was performing guard duty, one of the most serious offenses known to the academic regulations and one that has, perhaps, caused more trouble in the enforcement of discipline than any other, and one which has only recently caused Congress to pass an act of great severity for the punishment thereof.

Concerning this charge the Court of Claims say in their opinion:

> It is clear from the record here that claimant was deficient in conduct, for which he was dismissed, and, as we think, in conformity to the law we have recited.

It would seem necessary for the maintenance of discipline that the right of immediate dismissal should be placed in the hands of some responsible official. Such being the case, in whose hands could it be placed with less danger of injury to the interests of the Government or to the welfare of the cadets themselves, than in the hands of the Chief Executive of the Government, who is always directly responsible to the people for his acts.

Finally, the claimant having married some time between the date of his dismissal, July 27, 1883, and March 5, 1888 (Finding V, Rec., p. 9), was subject to dismissal under the eighteenth regulation of the rules and regulations for the United States Military Academy for the year 1883, which provides that—

> No married person shall be admitted as a cadet; and if any cadet shall be married before graduation, such marriage shall be considered as equivalent to a resignation, and he shall leave the institution accordingly.

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